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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

NORTHWEST PROCESSING, INC., Appellant, v. **State of Washington DEPARTMENT OF ECOLOGY,** Respondent.	**PCHB Nos. 89-141 & ~~143~~ 142** **FINAL FINDINGS OF FACT, REVISED CONCLUSIONS OF LAW AND ORDER AFTER RECONSIDERATION**

Northwest Processing, Inc. appealed the Department of Ecology's (Ecology) Order No. DE 89-S193 and Notice of Penalty Incurred and Due No. DE 89-S194 ($114,000) which allege violations of the dangerous waste regulations, Chapt. 173-303 WAC. The appeals were consolidated.

The matter concluded on March 29, 1991 with the parties' filing proposed Findings, Conclusions and Order. The formal hearing on the merits was held on February 26-28, 1991 in Lacey, Washington. Present for the Pollution Control Hearings Board were Members: Judith Bendor, chair and presiding, Harold S. Zimmerman and Annette McGee. Appellant NWP was represented by Attorney Charles K. Douthwaite (Eisenhower, Carlson, Newland, Reha, Henriot and Quinn of Tacoma). Respondent Ecology was represented by Assistant Attorney General Douglas F. Mosich. Court Reporter Kim Otis (Gene S. Barker and Associates of Olympia) took the proceedings the first day; Brian Faxvog

(Vernon and Associates of Tacoma) took the remaining two days. A party ordered the entire transcript, a copy of which has been filed with the Board.

Prior to the hearing there had been Partial Summary Judgment Motions Practice. The Board denied the Motions and proceeded to a Hearing on the merits.

As a result of the Motions practice and the Hearing, the Board heard and read sworn testimony, reviewed admitted exhibits, and read and heard counsel's contention. Having conferred, on June 7, 1991 the Board issued Findings of Fact, Conclusions of Law and Order.

On June 17, 1991 appellant Northwest Processing Inc. filed a Petition for Reconsideration and document in support. Ecology filed its Response on June 27, 1991.

Having reviewed the foregoing, the Board issues these:

FINDINGS OF FACT

I

Northwest Processing, Inc. (NWP) is a Washington corporation, registered in 1987. Glenn R. Tegen is the president and owner of the company, which was incorporated in 1987. From some time that year until the hearing, NWP has been operating an industrial facility at 1707 Alexander Ave. in Tacoma, in part recycling petroleum fuels and waste oil. In 1988, at the time of an Ecology inspection, the company had eight employees, with two more on contract.

Glenn Tegen is also the owner of Lilyblad Petroleum, an affiliated company which, among other activities, recycles spent solvent. In the 1970s Lilyblad obtained the use of the Alexander Ave. site for tank storage capacity. In 1978 Lilyblad began recycling dirty solvent. Its need for extra tank storage was then met by using the Alexander Ave. site. In 1982 Poligen purchased the site and development of additional tank storage occurred. (The site is sometimes still called the Poligen site.) In 1987 the Solidus Corporation, also owned by Mr. Tegen, owned the site. At the time at issue, in 1988, NWP was leasing the site.

II

The State of Washington Department of Ecology (Ecology) is a state agency with statutory responsiblity for enforcing the State's dangerous waste laws.

III

In March or April of 1988, NWP, through Mr. Tegen, filed a 1987 TSD Facility Annual Dangerous Waste Report (Form 5) with Ecology which listed receiving substantial quantities of waste oil contaminated with chlorinated solvents and other materials. This box was checked: "No regulated wastes were treated, stored, or disposed of at this site.", with this text typed in: "(All wastes were managed under regulatory exemption WAC 173-303-017)" Exh. R-4. That regulation deals with exemption for recycling.

Because of the TSD Report and Tacoma Health Department and Tacoma's sewer utility contacts about possible discharges, Ecology conducted an inspection of the NWP facility on September 15, 1988.

IV

On September 15, 1988 at about 8:45 am, two Ecology inspectors arrived at the site without prior announcement. They were accompanied throughout the inspection by Mr. Steven F. Drury, NWP Vice-President for Operations. Mr. Drury had recently joined NWP, having arrived three weeks earlier. They were joined by Bob Templin, the NWP plant production foreman. At the time of the inspection Mr. Templin had been with the company (and the predecessor operator) for about 4 years. Part way into the inspection NWP called and had two Lilyblad employees join, to assist in providing information. The inspection lasted until about noon.

Prior to leaving, Ecology had an exit interview with NWP, outlining the problems seen. They directed that all spills be cleaned-up, all drains be sealed, all leaking drums be contained, and materials not be removed from the site. Ecology met with NWP the following week and further discussed the problems discovered. Ecology indicated that enforcement would be forthcoming. On October 24, 1988 NWP submitted a proposed work plan outlining how it planned to handle the situation. Correspondence and further communication ensued.

V

On January 10, 1989 Ecology issued Order No. DE 88-S334 (to take corrective action), and Notice and Penalty Due DE 88-S335 ($114,000). The Orders were both appealed to the Pollution Control Hearings Board, (PCHB Nos. 89-15 and 89-24). DOE rescinded the Orders in August 1989, reserving the right to reissue.

On September 22, 1989 Order No. DE 89-S193 (corrective action) and Notice of Civil Penalty Incurred and Due No. DE 89-S194 ($114,000) were issued. These were appealed to the Board and became the instant case. At the hearing the parties agreed to settle Order DE 89-S193, compliance having been attained. This was confirmed by letter (March 6, 1991).

Penalty Order No. DE 89-S194 was, therefore, the sole subject of the hearing. The Order has alleged an array of dangerous waste regulations violations under Chapt. 173-303 WAC.1/

VI

At the time of the inspection the site was surrounded by a cyclone fence. The front gate was open. (For convenience, appellants have identified parts of the site by Areas, see Exhibits R-5 and R-13.)

1/ See Conclusion of Law II, below, for the list of alleged violations. In this opinion, the terms dangerous and hazardous waste are used interchangeably, unless in quotes or otherwise indicated.

In Area 1 in the open, there were 9 tanks of approximately 300 gallons each. The tanks were not labeled. Some were rusty. They contained material that could not be identified during the inspection. After the inspection, NWP concluded the tanks contained material removed from their stormwater drainage system sump and the oil water separator.

All drains on-site lead to the oil-water separator. There was a switch which controlled whether the discharge went to the Blair Waterway and Puget Sound, or to the Tacoma sewer system and the wastewater treatment plant.

After the inspection, NWP removed the material. No chemical tests were done. The material was allowed to settle and separate. Oil was recycled; water was sent to a wastewater holding tank, and sludge was combined with sludge material from Area 5. Ultimately this sludge was shipped off-site under dangerous waste manifest.

VII

In Area 2 there were portable tanks along the west fence, in the open. Some were rusty. The tanks did not have dangerous waste labels. Some had flammability labels on them. One tank had waste mineral spirits written on it. During the inspection the contents were not identified. Eleven of the tanks had about 500 to 2,000 gallons each of liquid material from Lilyblad.

Subsequent tests showed the tanks contained solvent and water, had a flash point of less than 70 F, with total halogens of 15,646 ppm (parts per million). NWP contended that the material was on-site for recycling. It conceded the material was not handled in a timely fashion.

At the time of the inspection, NWP was not recycling solvent and was not capable of doing so, lacking the equipment. There is no evidence that NWP had recycled solvent in the past. At a minimum, it would have taken at least 6 weeks for recycling to begin on-site, and it would have been experimental.

The material was later shipped off-site under dangerous waste manifest.

VIII

In Area 3, in the open, there were 54 (55) gallon-drums. Some drums had hazardous waste labels showing the contents had been accumulated at Lilyblad in 1987. Some drums were stacked up to 3 high. Some were on pallets; some were not. Some had openings that were not closed. Some were rusty. There was no aisle space between the drums. It was difficult to inspect all the drums due to lack of aisle space and the height of stacking.

It was later determined the 54 drums came from Lilyblad and were from line purges and emptying customers' drums. Tests showed the contents were flammable, with a flash point of less than 70 F.

Drums with new product were stored adjacent to the dangerous waste drums. There were other drums in that area with dangerous waste labels. There was one 55 gallon drum containing creosote, with a hazardous waste label partially torn off. The inspectors could smell the creosote and NWP was conceded there had been a spill that had been cleaned up.

There was no fire extinguisher around or a sign warning about dangerous waste.

After the inspection, by November 30, 1989 the 54 drums were identified as dangerous waste. They were sent to Sol Pro at 1801 Alexander Ave., a permitted treatment, storage and disposal (TSD) facility, for characterization. At Sol Pro it was further determined that 2,150 gallons of the material contained a mixture of oil, solvent and water. This was disposed of by Sol Pro on November 30, 1988.

Of the remaining material, 459 gallons had arsenic levels above Sol Pro's tolerance levels. These materials were removed, manifested as dangerous waste, and shipped to several locations: 1. on February 15, 1989 the arsenic-laden material with low flash point and high BTU was sent to Systec; 2. on March 15, 1989 the sludge was sent to Marine Shale Processing in Louisiana, a TSD facility permitted to incinerate such material; and 3. on March 27, 1989 the last arsenic laden material, a 55 gallon drum, was sent to Penberthy Electromelt in Seattle for disposal.

IX

In Area 4 there was an open-sided shed. Under the shed there were hundreds of (55 gallon) drums containing material. Some drums had "Mineral Spirits Sludge" written on them. The drums did not have hazardous waste labels or accumulation dates. Some drums were dented; some were rusty. Some were open. Some were stacked on top of others.

There was no aisle space provided. Inspection was difficult, and Ecology walked around the perimeter. There was no fire extinguisher around or a sign saying that it was a hazardous waste area. During the inspection, the Lilyblad employees knew the drums' origin. However, at the time of the inspection, the contents could not be identified. The drums had been on-site for more than 90 days, since at least early spring of 1988.

X

It was later learned that 170 of the drums in Area 4 contained sludge resulting from Lilyblad's reclamation of spent Safety Kleen solvent. During the hearing it was uncontested the sludge was a waste product that should have been disposed of, and was not intended for recycling.

213 of the drums in Area 4 were identified as containing material from Lilyblad clean-up. Some had "penta sludge" written on them. Penta is short for pentachlorophenol. Pentachlorophenol is on the dangerous waste list in Chapt. 173-303 WAC.

XI

After the inspection, NWP did some preliminary sampling and divided the materials found in Area 4 into what they denominated as "regulated" (6,925 gallons) and "non-regulated" (5,465 gallons). NWP shipped all this material off-site under dangerous waste manifest. NWP handled the material that way because it was less expensive than to chemically test each drum. NWP personnel signed the dangerous waste manifests.

Area 4 off-site shipments began on December 16, 1988 with the first shipment of 1,200 gallons to Sol Pro on December 16, 1988. Additional shipments were sent in December, on January 13, 1989, in February, and in March, with the last 2 drums sent on March 27, 1989.

XII

In Area 5, in the centrifuge room, there were 9 to 12 drums in good condition, with no dangerous waste labels or accumulation dates, and no identification of major risks in handling. During the inspection the staff identified the drums as containing centrifuge sludge. The sludge had resulted from NWP's oil re-processing operation, produced at the rate of 1/2 to 1 drum per month. Some of the material had been on-site for 9 months.

At the time of the inspection the drums' contents had not been tested to determine if they had dangerous or extremely hazardous waste. NWP did not have a procedure for testing the drums' content. NWP did not notify Ecology it was generating dangerous waste nor did

it obtain an EPA/state identification number.

After the inspection NWP had the contents analyzed. It showed the material had a dangerous waste characteristic D0001, for flammability. Hazardous labels were put on the drums. The drums were moved to a bermed no outlet area. On February 24, 1989 the sludge, 1200 gallons, including sludge from Area 1, was shipped off-site. We find it more likely than not that this 1200 gallons weighed more than 2200 pounds. The material was sent under dangerous waste manifest to a permitted dangerous waste facility for disposal.

At the hearing NWP contended it had been retaining the Area 5 sludge, because it believed there was potential the material could be further recycled. Other than generalities on intent, NWP did not provide evidence on NWP's recycling the material. The evidence showed that NWP did not recycle the material prior to the inspection due to the "time and the effort and the engineering changes to process those drums." RP II p. 23 line 7. NWP conceded it did not have the present technical or near-term cabability to recycle the material.

XIII

Area 6 is within NWP's tank farm. One 100,000 gallon capacity tank was identified as containing spent Safety Kleen solvent. The tank was marked "Dirty Solvent". It did not have a dangerous waste label with accumulation date, nor any label for flammability. The

tank was leaking material from the valve system onto the ground. The tank contained 70,000 gallons of waste solvent. NWP had begun receiving this waste solvent in March or April of 1988.

At the time of the inspection NWP was not recycling spent solvent. See Finding of Fact VII, above.

After the inspection, a drip pan was placed underneath the valve, and the valve packing was tightened. Over a period of months the tank was emptied. The spent solvent was sent under dangerous waste manifest to a recycler in California. The water and sludges were sent under dangerous waste manifest to a permitted TSD dangerous waste facility. The tank was cleaned, inspected and tested for leakage.

These tasks were completed by February 24, 1989.

Drums that were not structurally sound, by January 10, 1989 were properly handled.

XIV

In May 1988 NWP had begun a program to determine what was in the drums later found in Areas 3, 4 and 5. Drums were numbered and moved to Area 4 for "temporary storage", and listed. By the time of the September 15, 1988 inspection, however, not all the drums had been moved; the drums' contents had not been characterized and the chemical composition for purposes of handling or shipment was not known.

XV

According to the plant production foreman, Mr. Templin, he did

accept materials for processing under manifest. However, Lilyblad had been storing materials near the warehouse, (Areas 3 and 4), including product and waste. The foreman did not know how this material had been handled when it came on-site. Appellant provided no evidence that Area 3 and 4 material was received under manifest.

During the inspection Ecology asked for dangerous waste records and specifically for manifests. They were told no records were kept there. No manifests, training records, inspection logs, contingency plan or other records were produced during the inspection. No manifests for NWP's receipt of Area 2-6 material were offered into evidence. There is no evidence that NWP filed unmanifested waste exception reports with Ecology.

We find NWP did not receive manifests for material found in Areas 2-4. We find that NWP had received manifests for the material found in Area 6, but had not kept copies on-site.

We find that NWP did not have an operating record at the facility that described each dangerous waste received or managed on-site, the methods and dates of the wastes storage, their location, or records and results of waste analysis and inspection.

XVI

In the tank farm, NWP personnel checked tank edges each day and looked at the tanks. NWP did not have a written inspection schedule for the tanks.

In other areas of the site, NWP did not inspect the hundreds of drums and tanks, nor did NWP have a written inspection schedule for them.

XVII

At the time of the inspection there were a few fire extinguishers on site near the process unit. There were no fire extinguishers or sprinklers in Areas 3 or 4.

Some additional fire extinguishers were added after the inspection.

XVIII

At the time of the inspection there was a warning sign at the entry gate. NWP had arranged with the Tacoma fire department to have the tank farm inventory list placed in a red mail box outside the front gate. The inventory listing did not include the drums or tanks found on site during the inspection in Areas 1-5. There were no warning signs about dangerous waste within the site.

XIX

At the site, there were telephones in the processing area, in Area 5, and in the main office building which is above the warehouse near Areas 3 and 4. The staff testified that they could hear each other if they yelled. There was no emergency alarm system.

There was a first aid kit, an eye wash fountain and safety showers on-site. Floor dry material was kept on-site in case of a spill.

At some point in time the facility had a backhoe and some air-operated diaphragm pumps and empty portable containers, in case of a spill.

At some point in time the facility had an agreement for 24 hour emergency response.

XX

At the time of the inspection NWP did not have an employee on-site who knew the contents of drums in Areas 1-5, or how the materials should be handled during an emergency. NWP had not had an environmental manager since April 1987.

At the time of the inspection, there was no official training on marking or labeling regulated waste containers. There was no formal safety training. Mr. Templin did receive some on-the-job training when he began working at the facility.

After the inspection an emergency coordinator was appointed. Employee dangerous waste training on handling emergency situations was held after January 1989.

NWP apparently did have a hazardous waste final facility application, (Part B), on-site during the inspection. This was not brought to the inspectors' attention. NWP personnel, Drury and Templin, at that time, were neither aware of the Application's existence nor its contents, i.e. that the Application had an emergency response component within the contingency plan. As the company

Vice-President described it, the situation when he arrived in late August was chaotic. There were three construction projects occurring and the plant was operating intermittently.

In the fall of 1988, after the inspection, NWP prepared an updated SPCC (Spill Prevention Containment and Countermeasures). For the City of Tacoma it prepared what is known as an ASPP, a more detailed emergency plan than the SPCC.

At some point in time NWP made contracts with emergency equipment suppliers.

The Spill Prevention Containmnent and Countermeasure plan was put on file with the police department, one local hospital, and DOE. This plan had been on-site during the inspection.

XXI

On May 22, 1989 NWP obtained a permit from the City of Tacoma Sewer Utility Division for the facility's discharges to the sewer system.

XXII

In 1990 NWP, through Mr. Tegen, sent an amended 1987 TSD Facility Annual Dangerous Waste Report for Lilyblad, listing its 2244 Port of Tacoma Road address.

Interim Status Procedural History

XXIII

The Penalty Order alleges that NWP violated the law by operating

a dangerous waste treatment, storage and disposal facility (TSD) on September 15, 1988 without a permit. The key question is whether NWP had Interim Status. Interim status requires the submission of a "Part A Application". An application for a final facility permit requires the submission of both Part A and Part B Applications. 40 CFR Sect. 270.10(e).

It was agreed by all parties in this proceeding that whether or not NWP had Interim Status did not otherwise affect responsiblity to comply with applicable operational regulations.

XXIV

In 1976 the Federal Resource and Recovery Act (RCRA) was passed (42 USC Sec. 6901 et seq.), for the handling of hazardous waste. Congress recognized that developing final permitting regulations and issuing permits could take several years. To solve this problem, existing TSDs were allowed to operate under "Interim Status", subject to regulation, until a final permit could be obtained. A TSD was "in existence" if it were treating, storing, or disposing of regulated hazardous waste on November 19, 1980.

In 1980 when the United States Environmental Protection Agency (EPA) adopted hazardous waste regulations, the operators at the now NWP site were storing new and dirty solvents in tanks. Recycling followed storage. It is undisputed that this type of activity was not covered by the 1980 EPA permit requirements as the spent solvent was

stored prior to recycling. So at that time NWP's predecessor did not need a permit as they were then exempt.

XXV

In 1982, after Poligen Corp. purchased the site, Lilyblad Petroleum sent to the EPA a RCRA permit application for the Poligen Plant at 1701 Alexander Avenue. This Application included a Notification of Hazardous Waste Activity, where Lilyblad checked the boxes indicating it was generating, transporting, treating, storing, disposing of hazardous waste. Glenn Tegen signed the Owner Certification.

On the Form 1 General Information Lilyblad stated the nature of business at the Poligen Plant:

> *storage facility for several products. One of the products stored is a spent aliphatic solvent (97% paraffins and 3% aromatics) now being recycycled at Lilyblad Petroleum (2244 Port of Tacoma Rd., Tacoma, WA). This particular product is non-listed but meets the ignitable characteristic as a hazardous waste. We also store mixed gas/diesel, virgin mineral spirits and used oil at this site.*
> *Note: We <u>wish to develop this site</u> and adjacent land into a facility capable of handling a wide range of used solvents, used oil, mixed gas/diesel and virgin products. <u>Our wish</u> is to develop a recycling center for solvents and a processing center for used oil and emulsified crude oil.* [Exh. A-25; emphasis added.]

In 1983 Lilyblad sent EPA a Form 1 General Information, stating the nature of the business at 1701 Alexander Avenue: the dehydration of slop oil emulsions and storage for petroleum and chemical products. No evidence has been presented that these 1982 and 1983 submittals were sent to Ecology prior to October 27, 1984.

It is uncontested that prior to 1984 the facility activities were not subject to Ecology dangerous waste regulation.

XXVI

On June 27, 1984 the State of Washington through the Department of Ecology filed with the Code Reviser amendments to the dangerous waste regulations, Chapt. 173-303 WAC. These took effect July 27, 1984. The amendments subjected certain previously exempt recycled waste to regulation, including wastes which tested for flammability, corrosivity, reactivity, and EP toxicity. See WAC 173-303-090. Also, wastes deemed "dangerous" under state law were regulated, even if not considered "hazardous" under federal law 40 CFR Part 261. WAC 173-303-805(4).

XXVII

It is appellant's position, in part, that the facility first became subject to Ecology regulation with these regulatory changes. In 1984 the facility was storing spent Safety Kleen waste in tanks for future reclamation. Ecology did not prove that Safety Kleen retained ownership of this waste under a batch tolling arrangement. Had such ownership been retained, in 1984 the material would have remained exempt from the hazardous waste regulations.
WAC 173-303-017(2)(f)(i)(A).

XXVIII

Notification of Dangerous Waste Activities for the 1701 Alexander site was not sent to Ecology within 3 months of July 27, 1984.

XXIX

On December 26, 1984 Ecology received a draft Part B Application from Lilyblad for the site. The cover letter from the company identified the submittal as a draft. This Part B Application also contained a Part A which included a Form 2 Notification of Dangerous Waste Activities. The Form 2 contained a Certification which states:

> *I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are signficant penalties for submitting false information, including the possiblity of fine and imprisonment.* [Exh. A-26.]

The Certification had the name of Glenn Tegen, President, typewritten. The Certification was neither signed nor dated.

XXX

On February 15, 1985 Lilyblad filed with Ecology a final Part B Application, which contained a Part A portion and Form 2. The Form 2 Certification was signed and dated.

Ecology responded to the final Part B Application in October 1985, providing an analysis but not approving a permit.

XXXI

In 1986 Ecology adopted new regulations which eliminated the batch tolling exemption and made such wastes subject to regulation.

By letter dated January 6, 1987, Solidus Corp. located at 2244 Port of Tacoma Road, sent a revised Part A Application to Ecology. Mr. Tegen, as President of Solidus, signed the transmittal letter which stated that the reason for the application was to reflect that the operators "are being changed from Petro Pacific Corporation to Solidus Corporation." Exh. A-28.

Some time in 1988 prior to the inspection another amended Part A Application was sent to Ecology. In the Form 2 Comments Section was typed:

> *This is not an initial notification. This is filled out as a supplement. Some recycled solvents are used in house as fuel for our boilers. This is our notification under WAC 173-303. The sludge, if any, from such solvent for fuel is stored for further disposal and the clean recycled solvent is pumped to the boiler as boiler fuel.* [Exh. A-29 and Exh. 8 to Tegen Affidavit.]

The transmittal letter stated the amendment was sent to show that NWP operated the site.

XXXII

NWP stated in a letter to Ecology dated June 1, 1988, signed by Mr. Tegen, that:

> *...several customers will not bring their materials to us since we do not have interim status.* [Exh. F to Memorandum in Support of S/J.]

Mr. Tegen held several discussions with Ecology regarding Interim Status in 1987 and 1988.

It is uncontested that no permit has been issued in response to Part B Application.

XXXIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board makes these:

REVISED CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and the subject matter. RCW 43.21B.300; Chapt. 70.105 RCW.

The Department of Ecology has the burden of proof in this penalty appeal. WAC 371-08-183. The Board decides the matter de novo.

II

Penalty Order No. DE 89-S194 asserts violations of these sections of Chapt. 173-303[2/]:

Permit:

-208(1):	Applying requirements of WAC 173-303-280 through 395 to all owners and operators of facilities which store, treat or dispose of dangerous wastes and which must be permitted.	(Violation No. 9)
-800:	Requirements to obtain permit	(No. 9)
-950(2):	Transferring, treating, storing without a permit.	(No. 19)

[2/] Chapt. 173-303 WAC, the state dangerous waste regulations, have been amended several times since their adoption in 1982. Unless specified otherwise in this opinion, the regulations as amended June 1987 are being applied. See Exh. R-19.

Generator:		
-070:	Failure to designate dangerous wastes.	(No. 1)
-170:	Failure to comply with generator and TSD facility requirements (designation of wastes, notifying the Department).	(No. 3)
-180:	Failure to manifest dangerous waste for transport and disposal.	(No. 4)
-190(1):	Failure to package dangerous wastes correctly for transport.	(No. 5)
-190(2):	Failure to label dangerous wastes.	"
-190(3):	Failure to properly mark dangerous waste for transport.	"
-200(1)(a) and (b):	Accumulating dangerous wastes on site longer than 90 days.	(No. 6)
-200(1)(c):	Failure to mark tanks and drums with accumulation dates.	"
-200(1)(d): all containers	Failure to mark and tanks of dangerous wastes.	(No. 6)
-200(1)(e):	Failure to comply with the requirements for personnel training, preparedness and prevention, contingency plan and emergency procedures.	"
-210(1), (2), (3), (4) and (5):	Generator recordkeeping: Failure to maintain manifests and designation tests on-site.	(No. 7)
220(1)(a) and (b):	Failure to accurately report dangerous waste activities.	(No. 8)
Facility:		
-120(4)(d):	Owners and operators storing recycling materials before they are recycled are subject to WAC 173-303-280-295; -420-440; and -800-840 and other provisions.	(No. 9)

Facility (cont'd)			
-300:	Failure to have and carry out a waste analyses program/plan.	(No. 10)	
-310: (No. 11)	Failure to have proper facility security.		
-320:	Failure to carry out and keep record of general facility inspections.	(No. 12)	
-330:	Failure to have a personnel training program, plans or records.	(No. 13)	
-340(1):	Failure to have a preparedness and prevention program.	(No. 14)	
-340(1)(a):	No internal alarm or communication system.	"	
-340(1)(b):	No device to summon emergency assistance in dangerous waste storage areas.	"	
-340(1)(c):	No fire extinguishers in dangerous waste storage areas. No spill control equipment.	"	
-340(1)(d):	No sprinklers, fire extinguishers, spill control or inspection records.	"	
-340(3): (No. 14)	Failure to maintain adequate aisle space.		
-340(4)(a), (b),(c) and (d):	Failure to make arrangements with appropriate authorities.	"	
-350:	Failure to have a contingency plan and emergency procedures.	(No. 15)	
-360:	Failure to have an emergency coordinator or emergency procedures.	(No. 16)	
-370:	Failure to have a manifest system.	(No. 17)	
-380:	Failure to maintain facility records.	(No. 18)	
-630(3):	Failure to mark tanks and drums.	(No. 6)	
-640(2):	Failure to mark tanks and drums identifying contents, to be legible at 50 feet.	(No. 6)	

Other:

-145: Discharge and spills of dangerous wastes into the environment. (No. 2)

III

We conclude that NWP was not recycling the waste found in Areas 1-6. The material was being accumulated.

We conclude the following materials were both "solid waste" and "dangerous waste" as those terms are used in Chapt. 173-303 WAC:

Area 1 sludge that was combined with the centrifuge sludge from Area 5 (see Finding of Fact VI).

Area 2, the liquid material found in the tanks (see Finding of Fact VII);

Area 3, the material in the 54 (55 gallon) drums, and the drum of creosote (see Finding of Fact VIII);

Area 4, the spent Safety Kleen solvent sludge in the 170 (55 gallon) drums and the Lilyblad clean-up material in the 213 (55 gallon) drums, (see Findings of Fact IX, X and XI);

Area 5, centrifuge sludge, 1200 gallons in 12 drums (see Finding of Fact XII); and

Area 6, spent Safety Kleen solvent, 70,000 gallons (see Finding of Fact XIII).

We are unpersuaded by NWP's claim that Ecology did not test all the above material, and therefore Ecology did not prove the material was dangerous waste. NWP signed dangerous waste manifest certifications for shipment of this material. After the inspection, the company made a business decision based on economics not to test the material. The signed manifests are prima facie evidence that the

material was dangerous waste. Because of its business decision, NWP did not have test data to rebut this evidence. It cannot now be heard to complain.

We are also not persuaded by NWP's claim that in some instances they had an intent to recycle. NWP had neither been recycling the material, nor did it have the technical capability to recycle. NWP's mere "intent" to recycle does not satisfy legal requirements.

It has not been proven that the material found in Area 1, other than the sludge, was a regulated dangerous waste.

IV

Interim Status

We conclude that the NWP as the owner/operator was storing dangerous waste on-site on September 15, 1988. It was therefore required to have either a TSD permit or Interim Status. WAC 173-303-280(1), -800, and -950(2).

Ecology contends the facility failed to make submissions for interim status within an appropriate "window" of time. Under the June 27, 1984 amendments to the regulations, (WAC 173-303-805(3), in effect on July 27, 1984), if a facility not previously managing dangerous waste becomes subject to Chapt. 173-303 WAC, then the facility may qualify for Interim Status by complying with notification requirements within three months, and submitting within six months Part A of the permit application.

Ecology has not proven that in 1984 the facility was engaging in "batch tolling". Therefore, NWP was not exempt on July 27, 1984 from state regulation for the spent solvent the company was handling (see Finding of Fact XXVII). We therefore conclude that on June 27, 1984 the NWP facility first became subject to state regulation under Chapt. 173-303 WAC.

It is uncontested that notification was not provided to Ecology within the three month period after July 27, 1984, i.e. by October 27, 1984. Notification was provided on December 26, 1984 in an unsigned, undated Form, with signed notification in February 1985.

We conclude NWP did not comply with WAC 173-303-805(3)'s requirement to provide notification of dangerous waste activity to Ecology within 3 months.

In addition, WAC 173-303-805(3) requires that a Part B application be submitted within 6 months. NWP denominated its December Part B submittal as a draft. The enclosed certification of Notification was unsigned. (See Finding of Fact XXIX). We also conclude the December submittals were inadequate. The February 1985 Part B submittal was after the 6 month window.

Appellant appears to be contending that its submittals to EPA somehow accorded it Interim Status. There is no proof that EPA had accorded Interim Status. To the contrary, in 1988 EPA stated that Interim Status had not been accorded. In addition, there is no evidence NWP's predecessor filed the 1982 and 1983 Applications and Notices of Activity with Ecology prior to October 27, 1984.

Appellant appears to be contending, in the alternative, that the 1987 and 1988 Applications qualified the facility for Interim Status. This assertion is totally contrary to appellant's own position that there was dirty solvent on-site in 1984, there was no batch tolling arrangement, and therefore the facility had become subject to State dangerous waste regulation in 1984. NWP denominated its 1987 and 1988 submittals as amendments. They were submitted to show a change in the operator. These submittals did not satisfy the WAC 173-303-805(3) requirements to file Interim Status Notification within 3 months of July 27, 1984. The provision allowing Interim Status is not designed for the facility to apply for it years after its activities make it subject to regulation. For such long-term operation, a permit issued after Part B Application fulfills that requirement.

We conclude that NWP was the owner/operator of a dangerous waste storage facility which was operating on September 15, 1988 without Interim Status or a TSD permit, in violation of WAC 173-303-208(1), -800, and -950(2).

V

Ecology has not proven that prior to the inspection NWP was shipping dangerous waste off-site. Ecology has not proven, therefore, that NWP was required to prepare manifests for transport and disposal. No violations of WAC 173-303-180 or -190 have been shown.

VI

We conclude NWP violated 173-303-145 when it allowed the spilling of waste solvent, a dangerous waste, onto the ground.

Generator

VII

The regulations define a "generator" as:

> any person, by site, whose act or process produces dangerous waste or whose act first causes a dangerous waste to become subject to regulation. WAC 173-303-040(34).

We conclude that NWP was the generator of centrifuge dangerous waste sludge found in Area 5 and the sludge from Area 1 that was combined with the centrifuge sludge. Both were shipped off-site under dangerous waste manifest. WAC 173-303-040(34).

We conclude that NWP was not the generator of other dangerous wastes found on-site in Areas 2-4 and 6.

VIII

WAC 173-303-200(2)(a) allows a generator to accumulate dangerous waste on-site without a permit for 90 days. We have earlier concluded, Conclusion of Law IV, above, that NWP did not have a permit or interim status. The centrifuged sludge was on-site for more than 90 days. We have already concluded the material was both "solid waste" and "dangerous waste". Conclusion of Law III, above.

The key issue is: when does this 90 day accumulaton clock start? Appellant contends there was no violation because it shipped the material off-site within 90 days of the company's characterizing the sludge. Inherent in this contention is the view that the regulation does not have a time limit for characterization. Instead, appellant contends the 90 day accumulation clock starts when the generator has adequate knowledge to designate its waste. This 90 day accumulation period purportedly excludes the time necessary for analysis and designation of suspected waste. In support, appellant offers on Reconsideration an Ecology 1982 internal memorandum from the Assistant Director, Office of Land Programs to Persons Interested in Hazardous Waste.

Respondent Ecology opposes this interpretation, contending the Board's original Conclusion of Law XIX (sic., IX) was correct, the "90 days" starts when the generator first generates the waste. There has not been extensive briefing on this issue. Further, Ecology opposes the admission of the memorandum. We admit the document into the Record. Appellant first offerred the document as evidence on May 16, 1991.

We conclude there has been a violation of WAC 173-303-200(2)(a)'s 90 day accumulation provision under either of two legal theories.

We conclude the regulation implicitly contains a reasonable time limit by when the generator has to conduct tests or do what is

otherwise necessary to designate the material. Whether that limit is 24 hours or several weeks, we need not decide under the facts of this case. NWP accumulated the dangerous waste on-site for 9 months with no effort to designate.

Adopting appellant's approach would allow a dangerous waste storage facility an open-ended period of time before designation would be required. Such an interpretation would essentially nullify the time limits in the regulation, and is unreasonable in light of the regulations and the statute as a whole.

Appellant also appears to be contending a negligence standard applies to determine when the 90 day clock begins, i.e. when NWP knew or should have known the material required designation. We are reluctant to superimpose a negligence standard onto a strict liability statute, especially with the absence of thorough briefing.

Nonetheless, even if this were the legal standard, a violation would have occurred. The materials that were being centrifuged in Area 5 were, in large measure, sludges from the company's oil re-processing operation. NWP professed to have an Interim Status to handle dangerous waste. It handled an array of flammable substances. Yet, the wastes had been on-site for up to 9 months and the company did nothing to determine if they were dangerous waste, not even test for flammability.

Even if the legal standard were one of negligence, we conclude from all the facts NWP knew or should have known the material generated had significant potential to be a dangerous waste. As such, testing should have been expeditiously done and designation would then have expeditiously ensued. We conclude NWP as a generator violated WAC 173-303-200(1)(a).

IX

As a generator, NWP had an affirmative responsibility to know what was in the oil-process centrifuge sludge, to designate it as dangerous waste or extremely hazardous waste (WAC 173-303-070 and 170(1)(a)), and to notify Ecology that it was a generator and obtain an identification number (WAC 173-303-170(2)). The company also had the responsiblity to notify Ecology it was a generator and obtain an identification number (WAC 173-303-170(2)).

We conclude WAC 173-303-070 and -170 were violated.

X

We conclude that as a generator NWP violated WAC 173-303-200(1)(b) and (d), and -630(3), when it stored dangerous waste in drums that were not identified as to the risks.

We conclude NWP as a generator violated WAC 173-303-200(1)(c) by failing to mark the drums with the accumulation dates.

We conclude NWP as a generator also violated WAC 173-303-200(1)(d) when it did not mark the drums clearly with the words "dangerous waste".

We conclude that NWP as a generator violated WAC 173-303-200(1)(e) which cross-references Sections -330 through -360. See Conclusions of Law XVII-XXI, below.

XI

WAC 173-303-210(1) requires a generator which ships dangerous waste off-site, to do so by manifest. Ecology did not prove this violation occurred.

For required records, WAC 173-303-210(2)-(5) specifies ey be retained for three years. NWP did not keep such records. The predicate action which triggers the retention requirement did not occur. Therefore separate violations of these sections have not been shown.

XII

NWP violated WAC 173-303-220(1)(a) by not submitting by March 1, 1988, a Generator Annual Dangerous Waste Report, Form 4.

Section -220(1)(b) requires a generator who stores dangerous waste on-site, to also comply with the reporting requirements of WAC 173-303-390, facility reporting. This will be addressed at Conclusion of Law XXVI, below.

Facility

XIII

WAC 173-303-120(4)(d) states that owners or operators of facilities that store recyclable materials before they are recycled are

subject to an array of provisions. A careful reading of those provisions makes clear that unless the owner/operator were also recycling, the requirements do not apply. DOE conceded during the hearing that NWP was not penalized as a recycler. Therefore, there is no violation of WAC 173-303-120(4)(d).

XIV

NWP became subject to the regulations on facilities because it stored dangerous waste on site. NWP also viewed itself as a TSD facility, see the Part A Applications. As a storage facility, NWP had the affirmative responsiblity to confirm its knowledge about a dangerous waste before storing it. WAC 173-303-300. NWP was receiving spent solvent, spent solvent sludge, and other substances commonly known to have dangerous properties. It was receiving such wastes from an affiliated company with common ownership. It made no effort to determine the contents so as to properly handle the materials, even though some drums had "Penta Sludge" written on them, a known dangerous waste. NWP did not do chemical analysis of the material prior to or during storage. Some of the material had been on-site for at least 9 months. NWP did not have a written waste analysis plan.

After the inspection it took up to six months to characterize the material for shipment off-site.

We conclude WAC 173-303-300 was violated.

XXV

WAC 173-303-310 states in part:

(2) A facility must have:
(a) Signs posted at each entrance to the active portion, and at other locations, in sufficient numbers to be seen from any approach to the active portion. Signs must bear the legend, "Danger-unauthorized personnel keep out," or the equivalent legend, ... and must be legible from a distance of twenty-five feet or more [...]

There was a warning sign placed at the entrance gate. It is uncontested that at the time of the inspection there were no warning signs in Areas 3 and 4, where hundreds of dangerous waste drums were stored. We conclude WAC 173-303-310(2)(a) was violated.

XVI

NWP did not have a written inspection schedule. There were hundreds of unlabeled drums containing dangerous waste in disarray. Some were rusty; some were open to the environment. Many were precariously stacked several tiers high. Hundreds of drums were stored so close together that there was insufficient aisle space to do a proper inspection. In addition, the valve on the 100,000 gallon capacity tank in Area 6 was malfunctioning, causing a leak to the environment. This leak was not detected until the Ecology inspection.

NWP's failure to have a written inspection schedule violated WAC 173-303-320(2). The inspecting that was done did not comply with WAC 173-303-320(1) and (3).

XVII

The personnel training that NWP did was apparently on-the-job, sporadic, not a coherent program, and did not provide sufficient training so that personnel could respond properly to emergencies. WAC 173-303-330 was violated.

XVIII

Ecology has alleged violation of WAC 173-303-340(1), (1)(a)-(d), (3), and (4)(a)-(d). The purpose of regulation WAC 173-303-340 is clearly stated in the first paragraph:

> *Facilities shall be designed, constructed, maintained and operated to minimize the possibility of fire, explosion, or any unplanned sudden or nonsudden release of dangerous waste or dangerous waste constitutents to air, soil, or surface or ground water that could threaten the public health or the environment. This section describes preparations and preventive measures which help avoid or mitigate such situations.*

Section (1) states:

> *(1)Required equipment. All facilities shall be equipped with the following unless it can be demonstrated to the department that none of the hazards posed by waste handled at the facility could require a specific kind of equipment specified below:*
> *(a) An internal communications or alarm system capable of providing immediate emergency instruction to facility personnel;*
> *(b) A device, such as a telephone or a hand-held, two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or state or local emergency response teams;*
> *(c) Portable fire extinguishers, fire control equipment, spill control equipment, and decontamination equipment; and*

(d) Water at adequate volume and pressure to supply water hose streams, foam producting equipment, automatic sprinklers, or water spray systems.

All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

We conclude Section -340(1)(b) was not violated as there were telephones for summoning emergency assistance from outside.

In contrast, there was no internal communication or alarm system. We conclude Section -340(1)(a) was violated.

There were a few fire extinguishers on-site and some absorbent material. However, the equipment was not sufficient, given the volume and type of material stored on-site, to fulfill the purposes of WAC 173-303-340 regarding fires, releases to the environment, and so forth. We conclude Section -340(1)(c) was violated.

Ecology did not present any proof regarding water availability. Therefore, no violation of Section 340(1)(d) has been shown.

NWP violated Section 340(3). In Areas 3 and 4 there was insufficient aisle space for personnel and/or emergency equipment.

XIX

WAC 173-303-340(4)(a) and (b) deal with arrangments to local authorities for handling emergencies. It states:

(4) Arrangements with local authorities. The owner or operator shall attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations, unless the hazards posed by wastes handled at the facility would not require these arrangements:

(a) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of dangerous wastes handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes:
(b) Arrangements to familiarize local hospitals with the properties of dangerous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility;

The information provided to the local authorities prior to the inspection was not sufficient to alert the authorities to the properties of the materials in Areas 1-5. We conclude, therefore, that Sections -340(4)(a) and (b) were violated.

Ecology did not prove that NWP's agreements for emergency services were not in existence prior to the inspection. Therefore, no violation of Section -340(4)(c) has been shown.

Section -340(4)(d) requires that as appropriate, the owner/operator shall attempt to arrange an agreement between parties for handling emergencies when there is more than one party which might respond. Ecology failed to prove a violation of this section.

XX

Ecology did not prove that at the time of the inspection NWP did not have a contingency plan on-site, or that the plan had not been distributed to local authorities. Therefore, no violation of WAC 173-303-350 has been shown.

XXI

At the time of the inspection, NWP did not have an emergency coordinator capable of coordinating emergency response measures. NWP also did not have anyone familiar with the contingency plan, the location and properties of wastes in Areas 1-5, or the location of records within the facility. NWP violated WAC 173-303-360.

XXII

A violation of WAC 173-303-370 is predicated upon the owner/operator having first received dangerous wastes accompanied by manifests. We conclude that manifests were likely received for materials later found in Area 6. Therefore, NWP violated Section -370(e) when it did not retain at the facility a copy of the manifests.

XXIII

NWP violated WAC 173-303-380, when it did not keep facility records.

XXIV

NWP violated WAC 173-303-630(3), when it failed to label drums in a manner which adequately identified the risks associated with the material.

XXV

WAC 173-303-640(2)(c) requires owners and operators who store dangerous waste to have "tanks" marked with labels or signs legible from fifty feet which adequately warn employees and others of the

major risks associated with the material. NWP violated this requirement for the tank in Area 6.

XXVI

Through application of WAC 273-303-220(1)(b), see Conclusion of Law XXI, above, NWP is required to comply with the annual facility reporting requirements at WAC 173-303-390.

We conclude Section -390(1) was violated when NWP did not file unmanifested waste report for wastes it later stored in Areas 3 and 4.

Ecology has not proven that the 1987 annual report was inaccurate, so no violations of subsections -390(2)(d) and (e) have been shown.

XXVII

We decide the appropriateness of the $114,000 penalty de novo. RCW 70.105.080 authorizes penalties up to $10,000 per day for each violation.

The purpose of civil penalties is to promote compliance by the company and the public. Coastal Tank Cleaning v. DOE, PCHB No. 90-61.

In determining whether the penalty was excessive, we look at the violations in light of the circumstances. College Terrace, Inc. v. Olympic Air Pollution Control Authority, PCHB 90-54. Such circumstances include the nature of the violations, including severity and extent, and the maximum amount of penalty assessment possible. Coastal Tank, supra. Other circumstances include the violator's prior

behavior, and their conduct after the inspection and before the Order issued. We address these factors in turn.

The maximum possible penalty is determined by the number of violations and days of violation. For example, NWP unlawfully stored dangerous waste that was not labeled. Each day is a separate violation. The penalty for this conduct, alone, could have been in the hundreds of thousands of dollars. There were an array of other violations. The total penalty could have been in the millions of dollars. A $114,000 penalty, instead, was imposed.

This Company, which was encorporated in 1987, did not have any reported violations prior to the 1988 inspection. The unlawful conduct, however, began less than a year after the Company was encorporated.

The violations were systemic and significant. Coastal Tank, supra. The regulations that were violated were neither arcane nor esoteric. Id. The facility was storing substantial quantities of unknown material that were, in fact, both dangerous and flammable. The owner/operator simply did not expend the resources necessary to properly and timely handle the wastes. Instead, hundreds of unlabeled drums were stacked without aisle space, precariously, several tiers high. Some of the drums were rusty; some were open. Scores were stored outside. The facility did not have any personnel who knew the drums' and tanks' contents, nor could the facility properly respond in

an emergency. There was no semblance of record keeping or personnel familiar with the few records they had. Warning signs and alarms were insufficient. These are very serious violations.

Once Ecology discovered the situation, it took NWP until March 1989, after the Order issued and 6 months after the inspection, for all the waste to be properly handled.

We conclude the operational violations alone, regardless of Interim Status, justify the $114,000 penalty.

XXVIII

Any Finding of Fact which is deemed a Revised Conclusion of Law is hereby adopted as such.

From these Revised Conclusions of Law, the Board enters the following:

ORDER

The Motion to Reconsider is GRANTED in part.

Penalty Order No. DE 89-S194 remains AFFIRMED in part, in conformance with this decision.

The $114,000 penalty remains AFFIRMED.

DONE this 18th day of July, 1991.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

0180B